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No. 90-125

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In the Supreme Court of the United States

OCTOBER TERM, 1990

HUGHES ANDERSON BAGLEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to expungement of the records of his arrest and indictment for receipt of weapons by a convicted felon where the district court suppressed the weapons as the products of an illegal search and the indictment was subsequently dismissed.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 19-25) is reported at 899 F.2d 707. The judgment of the district court (Pet. App. 1-18) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1990. A petition for rehearing was denied on April 19, 1990. Pet. App. 26. The petition for a writ of certiorari was filed on July 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

As part of an ongoing criminal investigation, law enforcement officers arrested petitioner and acquired a locked briefcase belonging to him. They opened the briefcase without obtaining a search warrant and discovered two handguns inside. Pet. App. 19-20. A grand jury indicted petitioner, charging him with receipt and possession of firearms by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1)[1] and 18 U.S.C. App. 1202(a) (1982). Petitioner moved to suppress the guns on the ground that they were seized in the course of an illegal search. The district court granted the motion and, on the government's motion, dismissed the indictment. Pet. App. 19-20. Following the dismissal, petitioner moved for the expungement of all the records of his arrest and indictment. The district court denied the motion. Pet. App. 1-13.

Petitioner appealed. The court of appeals weighed the government's need to retain the records for effective law enforcement purposes against the harm to petitioner caused by the retention and concluded that the district court did not abuse its discretion by declining to order expungement. Pet. App. 21-22. The court found that petitioner's arrest information and indictment constituted "valuable law enforcement records," Pet. App. 22, and that petitioner had failed to show that the government would misuse the records or that he would otherwise suffer serious adverse consequences if the records were retained, Pet. App. 23. In rejecting petitioner's argument that expungement of the records was required by the

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[1] The indictment alleged a violation of 18 U.S.C. 922(h)(1), but that appears to be a typographical error; the conduct described in the indictment violates 18 U.S.C. 922(g)(1).

Fourth Amendment exclusionary rule, the court explained that the requirements of the exclusionary rule were met when the district court barred the government from using the weapons as evidence at trial. Pet. App. 22-23.

ARGUMENT

Petitioner renews his contention that the records of his arrest and indictment should be expunged. The court below properly rejected this fact-bound claim; it merits no further review.

Expungement is a remedy that lies within the equitable discretion of the district court, and "relief usually is granted only in 'extreme circumstances.'" *United States* v. *Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977), cert. denied, 435 U.S. 907 (1978); see also *United States* v. *Friesen*, 853 F.2d 816, 817-818 (10th Cir. 1988); *United States* v. *McMains*, 540 F.2d 387, 389, 390 (8th Cir. 1976); *Rogers* v. *Slaughter*, 469 F.2d 1084, 1085 (5th Cir. 1972). In determining whether such circumstances are present, courts have balanced the government's interest in retaining arrest records against the harm to the defendant that retention of the records may cause. *Schnitzer*, 567 F.2d at 539; *United States* v. *Linn*, 513 F.2d 925, 927 (10th Cir.), cert. denied, 423 U.S. 836 (1975).

The courts below correctly struck the balance in this case against expungement. The retention of arrest records serves the important function of promoting effective law enforcement. Such records help to meet the "'compelling public need for an effective and workable criminal identification procedure.'"[2]

[2] In any particular case, the court must consider not only the government's need to maintain a specific arrest record; in addition, "the general need of the government for a system of

Schnitzer, 567 F.2d at 539. Congress explicitly recognized this need in 28 U.S.C. 534(a), which requires the Attorney General to acquire and retain criminal identification and crime records.

While an arrest record can give rise to adverse consequences for the person arrested, see, *e.g.*, *Schnitzer*, 567 F.2d at 539, petitioner has failed in this Court or in the courts below to point to any particular harm that he would suffer if the government retained his records. See Pet. App. 23; see, *e.g.*, *Linn*, 513 F.2d at 928. Nor has he explained how retention of the records will add significantly to the potential for harm already created by his previous criminal records. Pet. App. 12.

Petitioner does not claim that he was a victim of police harassment, that his conviction was sought for illegal purposes, that the government will misuse the retained records, or any other special circumstance necessitating expungement in this case. And, of course, in dismissing the indictment, the government did not concede petitioner's innocence; to the contrary, the court of appeals correctly noted that "[petitioner's] guilt is clear apart from the intervention of the exclusionary rule." Pet. App. 22.

In fact, as both courts below observed, this case is indistinguishable "from every other case where suppression of a key piece of evidence results in the dismissal of the case," Pet. App. 12, and " 'it [is] difficult to imagine that expun[ction], a remedy to be used in extreme circumstances, should be exercised every time a case is dismissed because evidence is suppressed.' " Pet. App. 24 (quoting district court). Indeed, as the court of appeals observed, Pet. App.

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records must add considerable weight to the government side of the balance." *Schnitzer*, 567 F.2d at 540 n.6.

23, "[a]lthough mistaken and unlawful, the officers' actions in this case were not taken in flagrant violation of the fourth amendment." The exclusionary rule served the function in this case for which it was designed: it prohibited the government from using against petitioner at trial evidence that was obtained in violation of petitioner's Fourth Amendment rights. Accordingly, as the court of appeals observed, "[petitioner] received his fourth amendment remedy when the district court suppressed [his] weapons for trial purposes." Pet. App. 22-23.[3] The exclusionary rule requires no more.

In any case, we doubt the validity of petitioner's premise that the retention of arrest records in these circumstances significantly threatens the deterrent function of the exclusionary rule. It is improbable that a police officer would engage in conduct he knew to be illegal, risking a civil action for damages and departmental disciplinary measures, for the sole purpose of creating records. But even assuming that some incremental deterrence would be obtained by requiring expungement of the records produced as a result of a Fourth Amendment violation, the maximization of deterrence has never been this Court's sole touchstone in deciding whether to apply the exclusionary rule or other sanction to a particular class of case. Rather, in recognition of the costs imposed by the exclusionary rule, the Court has restricted the application of the rule "to those areas where its remedial objectives are thought most efficaciously

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[3] Contrary to his assertion, Pet. 10, the cases cited by petitioner do not conflict with the result in this case. None of the cases concerned application of the exclusionary rule, or a consideration of whether the remedy dictated by that rule should include expungement of records.

served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). The negligible amount of additional deterrence that might conceivably result from expungement does not justify its adoption in the ordinary case.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Nor is petitioner helped, see Pet. 19-22, by the fact that the exclusionary rule applies to forfeiture proceedings. See *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965). A forfeiture is "clearly a penalty for [a] criminal offense," *id.* at 701; maintenance of arrest records is not.

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